Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ET AL., PETITIONERS

v.

MARIA WALTERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in light of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), including 8 U.S.C. 1252(g) (Supp. II 1996), as amended by IIRIRA, the district court had jurisdiction to entertain respondents' due process challenge to their potential deportation or exclusion based on administrative orders finding them in violation of 8 U.S.C. 1324c (1994 & Supp. II 1996), prohibiting immigration-related document fraud, or to enjoin respondents' deportation or exclusion based on that due process challenge.

2. Whether the courts below erred in concluding that Immigration and Naturalization Service notices served on aliens commencing administrative proceedings under 8 U.S.C. 1324c (1994 & Supp. II 1996) deprived the aliens of due process because the notices supposedly failed to advise the aliens with sufficient clarity that a final administrative order finding them in violation of Section 1324c would render them deportable and excludable.

PARTIES TO THE PROCEEDING

Petitioners are Janet Reno, the Attorney General of the United States, Doris Meissner, the Commissioner of the Immigration and Naturalization Service, and the Immigration and Naturalization Service. Petitioners were defendants in the district court and appellants in the court of appeals.

Respondents are Maria Walters, William Walters, Cesar Corona-Alvarez, Antonio Alvarez, Ninfa de Adames, Guadalupe Adames, Camila Garcia-Cruz, Omar Kayyam Meziab, Leslie Meziab, and a class of persons similarly situated, defined by the district court as the class of "[a]ll non-citizens who have or will become subject to a final order under Section 274C of the Immigration and Naturalization Act because they received notice forms that did not adequately advise them of their rights, of the consequences of waiving their rights or of the consequences of failing to request a hearing;" see p. 6, n.5, *infra*. Respondents were plaintiffs in the district court and appellees in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General, the Commissioner of the Immigration and Naturalization Service, and the Immigration and Naturalization Service, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-47a)[1] is reported at 145 F.3d 1032. The orders of the district court granting summary judgment to respondents (App. 48a-80a), entering a permanent injunction (App. 81a-98a, 99a), and denying the government's motion to

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[1] "App." refers to the separately bound appendix to this petition.

alter or amend the judgment and granting in part the motion to stay the injunction (App. 100a-116a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1998. A petition for rehearing was denied on August 5, 1998. App. 117a-118a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part: "No person shall * * * be deprived of life, liberty, or property, without due process of law."

Sections 1252 and 1324c of Title 8, United States Code (1994 & Supp. II 1996), are reprinted at App. 119a-138a.

STATEMENT

This case is a nationwide class action challenging, under the Due Process Clause of the Fifth Amendment, the adequacy of notice forms used by the Immigration and Naturalization Service (INS) when it commences administrative proceedings against aliens under 8 U.S.C. 1324c (1994 & Supp. II 1996), which prohibits immigration-related document fraud. The court of appeals concluded that the notices were constitutionally inadequate, directed the reopening of final orders of document fraud and final orders of deportation, and held that the district court had jurisdiction to enjoin deportation proceedings, notwithstanding the jurisdictional bar in 8 U.S.C. 1252(g) (Supp. II 1996) to district court suits challenging "the decision or action by the Attorney General to commence proceedings."

1. Section 274C of the Immigration and Nationality Act (INA), 8 U.S.C. 1324c (1994 & Supp. II 1996), makes it unlawful for any person (whether a citizen or an alien) knowingly to forge documents for the purpose of satisfying the immigration laws, or to use such forged documents. 8 U.S.C. 1324c(a) (Supp. II 1996). If the Attorney General believes that a person has violated Section 1324c(a), she may commence administrative proceedings against that person. The Attorney General must provide the person charged with notice and the opportunity for a hearing before an administrative law judge (ALJ). If the ALJ finds a violation, then the ALJ shall enter an order requiring the person to cease and desist from such violations, and to pay a civil fine of up to $2000 for the first violation and $5000 for a subsequent violation. 8 U.S.C. 1324c(d)(3) (1994 & Supp. II 1996). The person charged has a right to administrative appellate review of an ALJ order finding a violation, 8 U.S.C. 1324c(d)(4) (Supp. II 1996); 28 C.F.R. 68.53(a), and may obtain judicial review of a final order in the appropriate court of appeals, 8 U.S.C. 1324c(d)(5).

If the person found to have violated Section 1324c is an alien, he then is subject to removal from the United States. 8 U.S.C. 1182(a)(6)(F)(i), 1227(a)(3)(C)(i) (Supp. II 1996). Proceedings for removal of an alien are separate and distinct from the document fraud proceedings under Section 1324c. If one of the grounds in a removal proceeding is that the alien was found in a final administrative order to have violated Section 1324c, the alien may not collaterally challenge the merits of that order in his removal proceeding, just as the alien may not collaterally challenge the merits of a criminal conviction in a removal proceeding based on such a conviction. The Attorney General does have limited authority to waive the alien's inadmissibility or deportability

based on a Section 1324c violation if the alien is a first-time violator, and if the violation was committed solely to assist the alien's spouse or child. See 8 U.S.C. 1182(d)(12), 1227(a)(3)(C)(ii) (Supp. II 1996).[2]

2. A person charged with document fraud under Section 1324c is provided by the INS with two forms. The first form, entitled "Notice of Intent to Fine" (NIF) and written only in English, charges the person with document fraud and declares it to be the intent of the INS "to order you to cease and desist from such violation(s) and to pay a civil money penalty in the amount of: $___." Gov't C.A.E.R. 329.[3] The NIF also informs the person charged that he may request a hearing, and that if a written request for a hearing is not filed within 60 days, "the Service will issue a final and unappealable order directing you to pay a fine in the amount specified in this Notice and to cease and desist from such violation(s)." *Id.* at 330.

A second form, entitled "Notice of Rights/Waiver" (NOR/W), also written only in English, advises the person charged of various procedural rights in the Section 1324c proceeding. It further informs the person charged:

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[2] The Board of Immigration Appeals (BIA) has held that it does not have authority under 8 U.S.C. 1182(i) to waive deportation of aliens who are deportable because of a Section 1324c order. *In re Lazarte-Valverde*, Int. Dec. No. 3264, 1996 WL 82543 (B.I.A. Feb. 9, 1996). The alien in that case has filed a petition for review challenging the BIA's ruling. See *Lazarte-Valverde* v. *INS*, No. 96-70334 (9th Cir.); see also *Valenciano-Perez* v. *INS*, petition for review pending, No. 96-60514 (5th Cir.) (similar).

[3] "Gov't C.A.E.R." refers to the excerpts of record filed by the government in the court of appeals. "Resp. C.A.E.R." refers to the excerpts of record filed by respondents in the court of appeals.

> If you are not a citizen of the United States, you are further advised that, as an alien subject to a Final Order for a violation of Section 274C of the Act, you will be excludable pursuant to Section 212(a)(6)(F) of the Act, and deportable pursuant to Section 241(a)(3)(C) of the Act.

App. 8a; Gov't C.A.E.R. 331. The bottom of the NOR/W tells the person charged that he may waive his right to contest a charge of document fraud before an ALJ, and warns (App. 8a-9a; Gov't C.A.E.R. 331):

> If you wish to waive the 60-day period in which to request a hearing, and accept the issuance of an unappealable Final Order before the 60-day period expires, you may execute this waiver. By executing this waiver, you give up the above-stated rights and admit that the charges contained in the NIF are true. You further admit that you have violated section 274C of the INA, and accept the issuance of a Document Fraud-Final Order (Form I-764C) on these charges.

Aliens charged with document fraud are also, at times, contemporaneously served with an "Order to Show Cause" (OSC) commencing deportation proceedings. The grounds for deportation presumably would be something other than the document fraud charged under Section 1324c, since the document fraud itself would not have given rise to deportation until a final order was entered in the Section 1324c proceeding. 8 U.S.C. 1251(a)(3)(C); 8 U.S.C. 1227(a)(3)(C)(i) (Supp. II 1996). At the time that the record in this case was compiled, the OSC was written in both English and Spanish. Before 1996, Congress required Orders to Show Cause to be written in both English and Spanish. 8 U.S.C. 1252b(a)(3)(A) (repealed 1996). Present statu-

tory law governing the contents of the Notice to Appear commencing removal proceedings does not contain such a requirement, see 8 U.S.C. 1229 (Supp. II 1996); App. 108a, and the current practice of the INS is not to use Spanish in the Notice to Appear.[4] See Resp. C.A.E.R. 604-613; App. 54a-55a.

3. On August 16, 1994, respondents instituted this class action in the United States District Court for the Western District of Washington. They contended that the forms used by the INS to commence Section 1324c proceedings against aliens violate due process because they fail to inform aliens charged with a violation of Section 1324c of the potential consequences of the charge against them. Gov't C.A.E.R. 23. In particular, respondents contended that the various forms, taken in combination, do not make sufficiently clear to the alien that he may subsequently be deported for document fraud if he does not request an administrative hearing on the document fraud charge. *Id.* at 8-10.

a. The district court certified a class and granted summary judgment for respondents. App. 48a-80a.[5] It concluded that the forms used by the INS "violate due process by failing to inform class members of their right

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[4] The record in this case was compiled before recent changes to the immigration laws replacing the nomenclature for deportation and exclusion proceedings with "removal" proceedings and replacing the "Order to Show Cause" with the "Notice to Appear," which now commences removal proceedings. Nothing of substance in this case turns on the difference in terminology.

[5] The class certified by the district court consists of "[a]ll noncitizens who have or will become subject to a final order under Section 274C of the Immigration and Naturalization Act because they received notice forms that did not adequately advise them of their rights, of the consequences of waiving their rights or of the consequences of failing to request a hearing." App. 63a.

to a hearing, by failing to inform class members of the consequences of a final order under [Section 1324c], by failing to inform class members of the consequences of waiving their rights, and by failing to adequately explain the differences between the deportation-related forms, such as the OSC and the Request for Disposition [in which an alien may waive his right to a deportation hearing], and the NIF and NOR/W." *Id.* at 79a.

In finding a due process violation, the district court applied the three-factor test of *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). See App. 67a-76a. The court first noted there was little dispute that the first factor, the private interest of respondents in avoiding deportation or exclusion, deserved considerable weight. *Id.* at 68a-69a.

Regarding the second factor, the risk of erroneous deprivation and the value of additional safeguards (App. 69a), the court found the current INS forms to be flawed. The court initially noted that, although it believed nearly all recipients of the NIF and the NOR/W forms are not native English speakers, and most are native Spanish speakers, the forms are printed only in English. *Id.* at 70a. The court then acknowledged that the NOR/W form specifically warns the alien that, if a final order is entered against him under Section 1324c, he will be "excludable pursuant to Section 212(a)(6)(F) of the Act" and "deportable pursuant to Section 241(a)(3)(C) of the Act." Nonetheless, the court observed that, "[a]side from this single reference to the terms 'deportable' and 'excludable,' there is no mention whatever in the forms of immigration consequences of a final order under [Section 1324c]." *Id.* at 70a-71a. Further, the court found that what it regarded as the "technical, legalistic nature of the NIF and NOR/W documents" was exacerbated when they were served

contemporaneously with a deportation OSC, which was then written in both English and Spanish and which explains what lies ahead in deportation proceedings. *Id.* at 71a. The court also suggested that serving the OSC with the NIF and NOR/W forms "le[ft] many aliens with the false impression that the NIF and NOR/W forms, served in English only, are inconsequential documents." *Id.* at 73a.

Concerning the third *Mathews* factor, the interest of the government in avoiding increased burdens, the court was "persuaded that the burden on the INS to provide greater procedural protections is quite small." App. 75a. The court found that the "one-time expense incurred in redrafting and translating the NIF and NOR/W is not great," and suggested that the INS could "avoid the expense of redrafting and translating the NOR/W altogether just by discontinuing its use," because the INS was "under no statutory duty to seek a waiver of the right to a hearing." *Id.* at 75a, 76a.

b. The district court entered a permanent injunction prohibiting the INS from using the challenged versions of the NIF and NOR/W forms in commencing Section 1324c proceedings. App. 81a-98a.[6] The injunction further requires the INS to provide all aliens who are the subject of final orders entered in Section 1324c proceedings without a hearing with the opportunity to request reopening of those proceedings. *Id.* at 92a-96a. To make that opportunity available, the INS must mail personal notice (in English and Spanish) to all such aliens at their last known addresses. It must also

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[6] The injunction also barred the INS from using any NIF or NOR/W forms that are not written in both English and Spanish, App. 92a, but that portion of the injunction was overturned on appeal. *Id.* at 46a-47a.

engage in a publicity campaign, including issuing a news release about the case "to every news organization in the United States and in Central and South America via the news wire," distributing similar information to 800 immigration assistance providers, "international organizations and community outreach networks," and publishing a notice in the *Federal Register*. *Id.* at 93a. After that notice is disseminated, then the aliens will have 120 days in which to request reopening of their Section 1324c cases. If an alien timely requests reopening and declares that he did not understand the procedure to request a hearing on the Section 1324c charges or did not understand the "immigration consequences" of those charges, then the document fraud case must be reopened, unless the INS proves by a preponderance of the evidence that the alien, on the facts of his individual case, did receive constitutionally adequate notice. *Id.* at 93a-95a.

During the period in which class members are being afforded the opportunity to request reopening of their Section 1324c orders, the INS is enjoined from deporting (or taking any other action against) any class member based on a final order under Section 1324c, if that order was entered without a hearing. App. 94a. Once the 120-day period for requesting reopening has elapsed, the INS may deport any alien who has not requested reopening during that time, but it may not deport any alien who does request reopening until the motion to reopen and any reopened proceedings are fully adjudicated. *Ibid.*

If a final Section 1324c order is vacated after the alien requests reopening, and if the alien is subject to a final order of deportation based on the finding of document fraud under Section 1324c, then the INS must join in any request by the alien to reopen his final

deportation order. App. 95a-96a. In any case in which a class member outside the United States is entitled to participate in a hearing relating to the reopening of a Section 1324c proceeding, a reopened Section 1324c proceeding, a motion to reopen a deportation proceeding, or a reopened deportation proceeding, the INS must parole the alien into the United States or otherwise provide a means for the alien to attend the hearing. *Ibid.*[7]

4. The court of appeals affirmed the district court's judgment and the injunction, except insofar as they required the INS to use Spanish in the new charging forms. App. 1a-47a; see p.8, n.6, *supra*. The court believed that, whether or not any one factor would be sufficient, a "confluence of factors" rendered the forms utilized by the INS to commence proceedings under Section 1324c constitutionally inadequate. App. 18a (emphasis omitted). Among other things, the court faulted what it believed to be the forms' "failure to explain the drastic immigration consequences that ensue from a final order on the document fraud charges," their "legalistic language and confusing references to sections of the INA," and "the practice of presenting the monolingual fine notice and rights/waiver notice forms simultaneously with the bilingual OSC." *Id.* at 18a-19a.

The court of appeals rejected the government's argument that, because the only direct consequence of a

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[7] The district court subsequently stayed, pending appeal, the portions of its injunction that require the government to notify aliens of the opportunity to reopen their Section 1324c orders. App. 110a-114a. The prohibition against deportation of aliens remains unstayed, except that the INS may remove aliens who are independently deportable without regard to a Section 1324c order. *Id.* at 114a, 116a.

Section 1324c proceeding is an administrative order to pay a fine and to cease and desist from further violations, and because deportation is a collateral consequence of a Section 1324c order, the INS need not advise aliens that deportation may ensue after entry of such an order. App. 19a-20a & n.5. In the court's view, "[i]nforming an alien that a final order under [Section 1324c] will result in a finding of deportability and permanent excludability, and in most instances immediate deportation, is necessary in order to ensure that the alien understands that he *must* request a *separate* hearing on the document fraud charges in order to preserve his rights." *Id.* at 19a-20a. Otherwise, the court believed, "the alien has no reason to know that by waiving his opportunity for a document fraud hearing, he is waiving his right to a meaningful deportation hearing." *Id.* at 20a. And, the court stated, "the alien never learns *how* to take advantage of the deportation procedures because the combined effect of all the forms together is confusion." *Ibid.* (citing *Perkins* v. *City of West Covina*, 113 F.3d 1004, 1012 (9th Cir. 1997), as "explaining what kind of notice is constitutionally sufficient").[8] The court of appeals also concluded that the district court had properly evaluated the forms under the balancing test of *Mathews* v. *Eldridge*, *supra*. App. 21a-23a.

Finally, the court rejected the government's argument that Section 242(g) of the INA, 8 U.S.C. 1252(g) (Supp. II 1996), deprived the district court of jurisdiction to enjoin the deportation of aliens who are mem-

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[8] This Court granted certiorari in *City of West Covina* v. *Perkins*, No. 97-1230, on May 4, 1998, two weeks before the decision in this case was issued. 118 S. Ct. 1690 (1998).

bers of the respondent class. App. 43a-46a. Section 1252(g) provides:

> Except as provided in this section [Section 1252] and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. 1252(g) (Supp. II 1996). The court found Section 1252(g) inapplicable because, it believed, respondents' claims did not arise from a "decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien," but rather constituted "general collateral challenges to unconstitutional practices and policies used by the agency." App. 43a-44a. (quoting *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 492 (1991)). The court reasoned that "[a]lthough the constitutional violations ultimately may have led to the [respondents'] erroneous deportation, the resulting removal orders were simply a consequence of the violations, not the basis of the claims." *Id.* at 44a-45a.

The court also relied on its previous decision concerning Section 1252(g) in *American-Arab Anti-Discrimination Committee* v. *Reno*, 119 F.3d 1367, 1372 (9th Cir. 1997) (*AADC*), for the proposition that "where possible, jurisdiction-limiting statutes should be interpreted to preserve the authority of the courts to consider constitutional claims." App. 45a.[9] "In light of

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[9] This Court granted the government's certiorari petition in *Reno* v. *American-Arab Anti-Discrimination Committee*, No. 97-1252, limited to the question of jurisdiction, on June 1, 1998, shortly

these concerns," the court concluded that Section 1252(g) should not be read to prevent the district court from enjoining the deportation of class members. *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents two issues of broad importance for the administration of the Nation's immigration laws. The first question is whether, in light of the jurisdiction-limiting provisions of 8 U.S.C. 1252(g) (Supp. II 1996), the district court had jurisdiction to entertain respondents' challenge to their past or potential deportation or exclusion, based on respondents' contention that deportation or exclusion has ensued or would ensue from constitutionally inadequate procedures in their administrative proceedings under 8 U.S.C. 1324c (1994 & Supp. II 1996). That question is closely related to the jurisdictional question currently before the Court in *Reno* v. *American-Arab Anti-Discrimination Committee* (*AADC*), No. 97-1252 (to be argued Nov. 4, 1998). The second question is whether the lower courts erred in concluding that forms used by the INS to commence proceedings under Section 1324c were constitutionally insufficient because they did not provide aliens with sufficiently clear information about the potential consequences of those proceedings. That question is related to the due process and notice questions currently before the Court in *City of West Covina* v. *Perkins*, No. 97-1230 (to be argued Nov. 3, 1998). Accordingly, while the questions presented in this petition may ultimately warrant this Court's plenary review, we suggest that the Court hold this petition for the decisions in the above-mentioned cases and then

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after the court of appeals issued its decision in this case. 118 S. Ct. 2059 (1998).

dispose of the petition in light of its decisions in those cases.[10]

1. The district court lacked jurisdiction to prevent the INS from deporting or exclusing respondents. Section 1252(g) of Title 8, United States Code, provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

As we have explained at length in our brief on the merits in *AADC*, *supra*, Section 1252(g), which was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[11] strengthens and makes explicit the limitations on judicial review of orders of deportation under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* The purpose of Section 1252(g) is to foreclose premature judicial review of removal proceedings by consolidating all judicial challenges in the courts of appeals following entry of a final removal order. Under Section 1252, an alien may raise constitutional challenges to his removal order by filing a petition for review of such an order in the court of appeals, see 8 U.S.C. 1252(a)(1) (Supp. II 1996), but he may not proceed directly in district

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[10] We are providing respondents with a copy of our briefs on the merits in *AADC* and *City of West Covina*.

[11] Pub. L. No. 104-208, Div. C., 100 Stat. 3009-612, 3009-625 to 3009-627, as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657.

court.[12] This effect is confirmed by 8 U.S.C. 1252(b)(9) (Supp. II 1996), also amended by IIRIRA, which states that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States," is available only on a petition for review filed in the appropriate court of appeals.

Even before IIRIRA was enacted, the INA required aliens to bring all challenges to their deportation proceedings in the courts of appeals. As the Third Circuit explained in *Massieu* v. *Reno*, 91 F.3d 416, 421 (1996),

> even where an alien is attempting to prevent an exclusion or deportation proceeding from taking place in the first instance and is thus not, strictly speaking, attacking a final order of deportation or exclusion, it is well settled that judicial review is precluded if the alien has failed to avail himself of all administrative remedies, one of which is the deportation or exclusion hearing itself.

Under these principles, the lower courts erred in asserting jurisdiction over respondents' challenges to deportation proceedings that were commenced or could be commenced against them.

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[12] Under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*, which governs petitions for review of deportation orders, see 8 U.S.C. 1252(a)(1) (Supp. II 1996), a court of appeals hearing a petition for review of a deportation order may, if necessary, transfer a case to a district court for resolution of pertinent issues of material fact that were not resolved by the administrative agency itself in an administrative hearing. 28 U.S.C. 2347(b)(3).

The court of appeals concluded, however, that jurisdiction was not barred in this case because, it believed, this case does not arise from the "decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien." App. 43a-44a. It reached that conclusion because, in its view, "[a]lthough the constitutional violations ultimately may have led to the [respondents'] erroneous deportation, the resulting removal orders were simply a consequence of the violations, not the basis of the claims." *Id.* at 44a-45a. That conclusion cannot be correct. This case involves allegations by aliens who are, have been, or will be in removal proceedings or subject to final orders of removal that they have been deprived of liberty without due process of law. The deprivation of liberty is their removal, and the alleged lack of due process is the claimed constitutionally insufficient notice. Therefore, without an actual, pending, or threatened removal of the alien from the United States, he would have no due process claim at all. Accordingly, respondents' objective in this case must be to prevent, or to void, the entry of such removal orders, and the Ninth Circuit affirmed the district court's injunction barring the INS from deporting class members and requiring the INS to reopen final orders of deportation. App. 43a-45a, 47a. This case therefore falls squarely within the provisions of Section 1252(g).

Similar questions concerning the scope and applicability of Section 1252(g) are already before this Court in *AADC*, *supra*. Indeed, the Ninth Circuit in this case relied on its prior decision in *AADC*. See App. 45a. In that case, the question presented is whether the district court erred in entertaining a First Amendment-based "selective prosecution" challenge to pending deporta-

tion proceedings. If the Court agrees with our submission in *AADC* that jurisdiction over constitutional challenges to deportation proceedings belongs solely in the courts of appeals on petition for review of deportation orders, then it would follow that the district court lacked jurisdiction to prevent the deportation of class members in this case. Moreover, if the Court disagrees with our jurisdictional position in *AADC* based on factors peculiar to that case, it might nonetheless conclude that jurisdiction is absent in this case under the general rule. Accordingly, we suggest that the Court hold this petition for its decision in *AADC*.

2. The court of appeals also erred in its disposition of the merits of this case. The court concluded that the notices used by the INS in commencing Section 1324c proceedings were constitutionally insufficient because they did not inform aliens that they would be subject to deportation if a Section 1324c order was entered against them. That ruling necessarily rests on two premises: (a) the INS is required to provide notice, when commencing Section 1324c proceedings, of the potential effect of such proceedings on subsequent deportation proceedings, and (b) the notice actually provided by the INS is inadequate to that task. Both premises are incorrect.

As an initial matter, the court of appeals erred in its conclusion that deportation is a direct, and not a collateral, consequence of a Section 1324c proceeding. The court noted that the INA itself specifically provides that "[a]n alien who is subject to a final order [on document fraud charges] is deportable." App. 19a n.5 (citing 8 U.S.C. 1251(a)(3)(C)(i)). But the INA also provides that aliens who are convicted of various crimes are deportable, and in some cases the Act prevents the Attorney General from waiving deportation of

such criminal aliens. See, *e.g.*, 8 U.S.C. 1227(a)(2), 1229b(b)(1)(C) (Supp. II 1996). Yet it is well settled that, when an alien pleads guilty to a criminal offense, the court need not advise him that his criminal conviction will render him subject to deportation. See *United States* v. *Osiemi*, 980 F.2d 344, 349 (5th Cir. 1993) (collecting cases); see also *Varela* v. *Kaiser*, 976 F.2d 1357, 1358 (10th Cir. 1992), cert. denied, 507 U.S. 1039 (1993); *United States* v. *Campbell*, 778 F.2d 764, 765-769 (11th Cir. 1985); *Michel* v. *United States*, 507 F.2d 461, 464-465 (2d Cir. 1974).

Further, even if the INS is required to inform an alien that entry of a Section 1324c order will render him subject to deportation, the forms at issue here do so. The NOR/W form expressly warns: "If you are not a citizen of the United States, you are further advised that, as an alien subject to a Final Order for a violation of Section 274C of the Act, you will be excludable pursuant to Section 212(a)(6)(F) of the Act, and deportable pursuant to Section 241(a)(3)(C) of the Act." App. 8a; Gov't C.A.E.R. 331. The court of appeals rejected that language as "legalistic" (App. 19a), but that observation amounts to nothing more than a policy disagreement with the INS about how best to inform aliens of the consequences that may result from waiver of the right to a hearing, and it is quite likely that aliens will perceive references to their being "excludable" and "deportable" as serious matters deserving their close attention.

The court of appeals' error rests on more than a misjudgment of the facts of this case, however. It rests on a fundamental misapprehension of the notice requirements of due process. Due process requires that an individual be notified of the pendency of a governmental action against him. See *Mullane* v. *Central*

Hanover Bank & Trust Co., 339 U.S. 306 (1950). It does not require that such notification inform the individual of details about the legal procedures, or the potential consequences of the action, when such information is available from other public sources, such as statutes and regulations. As we have explained in our brief in *City of West Covina* (at 15-19), this Court's decisions establish that the government may generally rely on the applicable law to inform persons of details about their legal rights and remedies. See *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233, 237 (1944); *Reetz* v. *Michigan*, 188 U.S. 505, 509 (1903). Individuals who receive notice that a government action is pending against them may consult publicly available sources of law at a library or courthouse, may engage a lawyer, or may make informal inquiries of government officials to obtain information about the consequences of such an action. Since the INA itself makes clear that entry of a Section 1324c order will make the alien deportable, see pp. 3-4, *supra*, the INS is not required as a matter of due process to include that information in its notices.

The Court's decision in *City of West Covina* may therefore affect the outcome of this case. Indeed, the court of appeals in this case relied on its earlier decision in *City of West Covina* (see App. 20a), where it held that a notice informing a property owner that his property had been seized pursuant to a search warrant was constitutionally insufficient because it did not give information about the judicial remedies that the property owner could invoke. See 113 F.3d at 1012. Moreover, in this case, as in *City of West Covina*, the court of appeals relied on the three-factor balancing test of *Mathews* v. *Eldridge*, *supra*, to evaluate the sufficiency of the notice. But, as we have pointed out in our brief in *City of West Covina* (at 25), while that test has been

used to evaluate the adequacy of a *hearing* provided by the government, it has not been used by this Court to test the adequacy of a *notice* commencing a governmental action. Accordingly, if this Court holds in *City of West Covina* that the *Mathews* test does not apply in notice cases, then a central basis for the court of appeals' decision will be removed.

CONCLUSION

The petition for a writ of certiorari should be held for the Court's decisions in *Reno* v. *American-Arab Anti-Discrimination Committee*, No. 97-1252, and *City of West Covina* v. *Perkins*, No. 97-1230, and then disposed of as appropriate in light of the decisions in those cases.

Respectfully submitted.

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